United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1754

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *ex rel.*
DAVID W. O'BROCTA,
Relator-Petitioner-Appellees,

vs.

COMMANDING OFFICER, United States Armed Forces, Examining and Entrance Station,
R. F. FROEHLKE, as Secretary of the Army,
and
SELECTIVE SERVICE SYSTEM, Local Board No. 88,
Respondents-Appellants.

APPELLANT'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JOHN T. ELFVIN,
United States Attorney,
Attorney for Appellants,
United States Court House,
Buffalo, New York 14202.

KENNETH A. COHEN,
Assistant United States Attorney,
of Counsel.

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APPELLANT'S BRIEF.

I. Statement of Facts and Regulation.

A. Litigation History.

On December 27, 1972 the petitioner, David E. O'Broc submitted to induction into the Armed Forces and on th date his attorney filed a petition for a writ of *habeas corp* (App. p. 3) and obtained (1) an order to show cause why t petition should not be granted and a (2) temporary restraini order prohibiting the Armed Forces from removing O'Broc from the Western District of New York (item 3). On April 3 1973 and May 4, 1973 a hearing and argument were held the matter (App. pp. 35-50) and on May 15, 1973

petitioner and Government stipulated that Genesee Community College mailed Local Board No. 88 a letter dated November 6, 1970 referring to Charles F. Zack, (App. p. 14) a letter dated November 17, 1970 (App. p. 16) enclosing the trustees' statement on implementation of the "Full Opportunity Program at Genesee Community College" (App. p. 17) and a brochure entitled Genesee Community College (App. p. 21). At the hearing, petitioner called upon Charles Claar, Coordinator of the Developmental Study Program of Genesee Community College, to testify that he was enrolled in the college's Developmental Study Program which required high risk students, such as petitioner, to study for one preparatory semester before beginning the four semesters required to award him a degree of Associate in Applied Sciences and Business Administration which other students not in the high risk program would have obtained after four semesters of study (App. pp. 37, 38). On March 27, 1974 the Court granted petitioner's writ of *habeas corpus* (App. pp. 26-32). The Court reasoned that the petitioner had requested an appeal of his classification which had never been processed. Pursuant to 32 CFR § 1626.41 an order to report for induction which is issued during the period during which an appeal is pending to the appeal board shall be ineffective and shall be cancelled by the Local Board. The Board's order to report for induction outstanding in this case was therefore invalid even though the petitioner's Selective Service classification had twice been reopened after the unprocessed request for an appeal (App. pp. 30, 31). In so holding, the Court relied on *United States v. Madrid*, 314 F.Supp. 17 (W.D.Tex. 1968) and *United States v. Olkowski*, 248 F.Supp. 660 (W.D.Wis. 1965) and rejected the Government's contention that *United States v. Lyzun*, 444 F.2d 1043 (7th Cir., 1971) cert. denied 404 U.S. 968 (1971) was controlling (App. pp. 30-32).

B. Selective Service History.[1]

On November 22, 1968 the petitioner, David Wayne O'Brocta, registered with the Selective Service System (App. p. 51). In December 1968 he informed Local Board 88 that he would graduate from high school in June 1969 (App. p. 55) and on January 21, 1969 the Board classified him 1-SH (App. pp. 51, 57) in accordance with 32 CFR § 1622.15(a). On July 9, 1969 the petitioner informed Local Board 88 that he would be a fulltime student for the next semester at Genesee Community College in Batavia, New York (App. p. 60) and on September 8, 1969 (App. p. 57) the Board received his request for an undergraduate student deferment (App. p. 61) and the student certificate from Genesee Community College certifying that petitioner had entered upon and was satisfactorily pursuing a fulltime course of instruction in the first year and was expected to receive his degree on or about June 1971, a normal two year program (App. p. 62). On September 30, 1969, however, the petitioner informed the Board that he would complete his degree requirements in June 1972 (App. p. 64). Local Board 88 resolved the conflict between the information provided by the college and that provided by petitioner by giving the college certification credence and classifying petitioner II-S in accordance with 32 CFR § 1622.25.[2]

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[1] The Local Board minutes (App. pp. 57, 58) may be used as a chronological reference. All CFR references are to the 1969 edition unless otherwise indicated (See SSLR ps. 2047-2049).

[2] § 1622.25 Class II-S: Registrant deferred because of activity in study.

(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(Footnote continued on following page)

Class II deferments were granted for a period of one year or less 32 CFR § 1622.21(a)(b).[3] Each registrant requesting a student deferment in Class II-S was obligated to provide his Local Board each year with evidence that he was satisfactorily pursuing a fulltime course of instruction 32 CFR § 1622.25(d).

On September 1, 1970 Local Board 88 reclassified petitioner I-A (App. pp. 51, 57). On September 23, 1970 the Board received petitioner's request for an undergraduate student deferment (App. p. 67) and a student certificate from the registrar of Genesee Community College

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(Footnote continued from preceding page)

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

[3] § 1622.21 Length of deferments in Class II.

(a) Class II deferments shall be for a period of one year or less. If there is a change in the registrant's status during the period of deferment in Class II, his classification shall be reopened and considered anew.

(b) At the expiration of the period of a registrant's deferment in Class II, his classification shall be reopened and he shall be classified anew in the manner provided in Part 1625 of this chapter. The registrant may be continued in Class II for a further period of one year or less if such classification is warranted. The same rules shall apply when classifying a registrant at the end of each successive period for which he has been classified in Class II.

(App. p. 66). This time, however, the certificate indicated that petitioner was expected to receive his degree in January of 1972, one semester later than the date on which he was expected to graduate when he first entered Genesee Community College (App. p. 62).

Since petitioner requested a student deferment and provided the Board with information it had not considered on September 1, 1970 in accordance with 32 CFR § 1625.2(a)[4] the Board reopened his classification and in accordance with 32 CFR § 1625.11[5] reclassified petitioner I-A on October 6, 1970 (App. pp. 51, 57). That reclassification gave petitioner the right to a personal appearance and an appeal 32 CFR

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[4] § 1625.2 When registrant's classification may be reopened and considered anew.

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.
[E. O. 10594, 20 F.R. 740, Feb. 3, 1955]

[5] § 1625.11 Classification considered anew when reopened.

When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

§ 1625.13[6]. Local Board 88 notified him of those rights (App. p. 68). That new I-A classification indicated that Local Board 88, after receiving information that petitioner would no longer be receiving his degree within the normal number of years established by the school to obtain such a degree, determined he was no longer satisfactorily pursuing a fulltime course of instruction within the requirements of 32 CFR § 1622.25(c).

By letter dated November 2, 1970 petitioner informed Local Board 88 that he had spent the first three months of his term of study at Genesee Community College taking preparatory courses, was currently a fulltime student at Genesee Community College and expect to graduate in December 1971. Petitioner "wonder[ed] if there [was] a possiblility of a change in [his] classification from [his] present I-A." In another paragraph he requested a personal appearance (App. p. 71). In the case below the Government conceded that the quoted language constituted a request for an appeal.

On November 17, 1970 Genesee Community College wrote Local Board 88 informing it about the college's intermediate or developmental program (App. p. 16). Neither in the two student certificates nor in the explanatory material mailed to Local Board 88 did Genesee Community College ever state that petitioner was in the intermediate developmental program or a high risk student. Even Charles Claar, Coordinator of the developmental study program, did not testify that Genesee Community College had notified Local Board 88 that petitioner was a participant in the program (App. pp. 33-50). In addition, neither the verified petition of December 27, 1972 (App. pp. 3-10) nor petitioner's self-serving supple-

[6] § 1625.13 Right of appeal following reopening of classification.
Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

mentary affidavit of Feburary 2, 1972 (App. pp. 11, 12) allege that petitioner informed Local Board 88 that he was a participant in the developmental program at the Genesee Community College. The only information Local Board 88 had which would allow them to draw that conclusion was one sentence in petitioner's letter of November 2, 1970: "The first three months, from September 1, 1969, to December 31, 1969, were spent taking preparatory courses." Even if the Board had been informed that petitioner was in the program they were not required to classify him II-S because of his failure to meet the requirements of "satisfactorily pursuing a fulltime course of instruction."

On December 22, 1970 petitioner was scheduled to meet with the Government appeal agent prior to his personal appearance with the Local Board scheduled for the same date (App. p. 73). The record is silent as to whether or not petitioner consulted with the appeal agent. The summary of the appearance before the Local Board indicates that petitioner requested classification into class I-Y on the basis of his not being acceptable for military service. The Board relied upon a prior determination of acceptability by the Armed Force Examining and Entrance Station (App. p. 70) and re-evaluation by the Armed Forces Examining and Entrance Station (App. p. 75) and continued petitioner in class I-A (App. p. 77). Petitioner abandoned his request for a student deferment.

Had Local Board 88 construed petitioner's letter of November 6, 1970 as an appeal as its clerk apparently did, (App. p. 57) 32 CFR § 1626.11(a),[7] it would have for-

[7] § 1626.11 How appeal to appeal board is taken.

(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal

warded his file to the Selective Service System appeal board for the Western District of New York. That event never transpired. Instead, on January 25, 1971, Local Board 88 ordered petitioner to report for induction and postponed that order so as to classify him I-SC in accordance with 32 CFR § 1622.15(b)[8] and on February 2, 1971 reclassified petitioner into class I-SC (App. pp. 51,58). This reclassification gave petitioner a new right to a personal appearance and an appeal 32 CFR § 1625.13. Since the Board had received a letter which should have been construed as an appeal they should not have issued petitioner that order to report for induction 32 CFR § 1626.41.[9] On June 1, 1971 in accordance with the in-

[8] § 1622.15 Class I-S: Student deferred by statute.

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of insturction at a college, university or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph

(1) who has previously been placed in Class I-S thereunder or

(2) who has been deferred as a student in Class II-S and has received his baccalaureate degree.

A registrant who is placed in Class I-S under the provision of this paragraph shall be retained in Class I-S

(1) until the end of his academic year or

(2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form 102) and be identified on that record as Class I-S(C).

[E.O. 10292, 16 F.R. 9862, Sept. 28, 1951, as amended by E.O. 11360, 32 F.R. 9790, July 4, 1967]

[9] § 1626.41 Appeal stays induction.

The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board.

[E.O. 10659, 21 F.R. 1103, Feb. 17, 1956]

formation contained on the student certificate of September 18, 1970 (App. p. 66) Local Board 88 reclassified petitioner into class I-A, which reclassification again provided him with the rights of a personal appearance and an appeal. Petitioner presented the Local Board with no information concerning his status. It can be inferred petitioner had fallen behind in his studies because in a resume submitted to Local Board 88 on September 28, 1972 he reports that he did not receive his degree from Genesee Community College until June 1972 (App. p. 94).

On October 8, 1971 Local Board 88 ordered petitioner to report for induction on November 18, 1971 (App. p. 80). On November 18, 1971 petitioner failed to report for induction as ordered, even though he had received his order (App. p. 7). Thereafter, it was his continuing duty to report for induction 32 CFR § 1632.14(a).[10]

Petitioner has attempted to explain his failure to report for induction on the fact that his father was informed by a

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[10] § 1632.14 Duty of registrant to report for and submit to induction.

(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

1971 amendments 36 F.R. 4752 (March 12, 1971)

(1) Paragraph (a) is amended as follows: in the first sentence thereof the words "or an Order for Transferred Man to Report for Induction (SSS Form 253)" are deleted and in the last sentence thereof the words "and to each local board whose area he enters or in whose area he remains" are deleted.

representative of Congressman Smith that he would be given a deferment or a postponement (App. pp 7 8). He never alleged receiving a deferment or a postponement from Local Board 88 after receipt of that induction order (App pp. 3-12). Nor does he allege any attempt by himself or his family to confirm that information from the Local Board. Local Board 88 never cancelled that induction order (App. p. 58).

On August 31, 1972 at the recommendation of an agent of the Federal Bureau of Investigation (App. p. 95), petitioner reported to Local Board 88 and informed it that he was a fulltime student at the State University of New York at Buffalo, requested a student deferment and indicated that he would be willing to report for induction if called upon (App. p. 88). The United States Attorney's Office requested Local Board 88 to reorder him to report for induction (App. p. 89) and on September 20, 1972 Local Board 88 scheduled a new reporting date of October 11, 1972 for petitioner (App. p. 92). On October 2, 1972 Local Board 88 received a student's certificate from the State University of New York at Buffalo indicating that on September 6, 1972 he had commenced instruction in the third year class with an expected commencement date of June 1974 (App. p. 93), a resume from the petitioner containing his view of his Selective Service history (App. pp. 94, 95) and an explanatory letter from the registrar explaining petitioners program (App. p. 96). In this resume petitioner informed the Board for the first time that following his induction order of October 8, 1971: "deferment requested and obtained by representative Henry P. Smith" (App. p. 94). Petitioner's outstanding induction order precluded Local Board 88 from reopening his classification based on this new information 32 CFR § 1625.2

(37 F.R. 8666 (April 29, 1972)).[11] Local Board 88 determined that the petitioner's induction order could be postponed until the end of his current semester (App. p. 97) and informed the United States Attorney's Office of that information (App. p. 98). Apparently this postponement was authorized by the State Director under 32 CFR § 1632.2(a) in order to give petitioner the benefit of the statutory postponement of induction under the Military Selective Service Act of 1971 50 U.S.C., App., § 456(i)(2).[12]

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[11] § 1625.2 Reopening of classification

(a) The local board will reopen and consider anew the classification of a registrant (1) upon the written request of the Director of Selective Service or the State Director of Selective Service and upon receipt of such request shall immediately cancel any order to report for induction or alternate service which may have been issued to the registrant; (2) who is in Class 1-H and becomes subject to processing for induction according to these regulations and the rules prescribed by the Director; (3) in any classification for the purpose of classifying him in Class 1-H according to these regulations and the rules prescribed by the Director; (4) upon the written request of the registrant that is accompanied by written information presenting facts not considered when the registrant was classified which, if true in the opinion of the board, would justify a change in the registrant's classification; or (5) upon its own motion if such action based upon facts not considered when the registrant was classified which, in the opinion of the board, would justify a change in the registrant's classification: *Provided*, That in the event of subparagraph (4) or (5) of this section, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order for induction or alternate service or, in the event the order to report for induction or alternate service was postponed and a subsequent letter from the local board establishes the date for induction or for reporting for alternate service, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

[12] (2) Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title [sections 451, 453, 454, 455, 456, and 458 to 471a of this Appendix], shall, upon the appropriate facts being presented to the local board, have his induction postponed (A) until the end of the semester or term, or academic year in the case of his last academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

Without any postponement of induction granted petitioner he again failed to report for induction on October 11, 1972 (App. p. 99). His father persuaded the United States Attorney that petitioner had been confused, assured him that petitioner did not intend to violate the Selective Service law and requested petitioner be reordered to report for induction after the completion of his current semester (App. p. 100). The United States Attorney's Office then requested a postponement until the end of the current semester (App. p. 100). On December 18, 1972 with the approval of the State Director's Office (App. p. 102) Local Board 88 reordered petitioner to report for induction on December 27, 1972 (App. p. 103). On December 27, 1972 petitioner submitted to induction and commenced this action.

II. ARGUMENT

A. The District Court erred in relying on *Madrid*.

The Court's reliance on *Madrid* was misplaced. In *United States v. Madrid*, 314 F. Supp. 17 (W.D. Tex., 1968) the registrant was reclassified from II-S to I-A by his Local Board on July 28, 1966 and requested an appeal of that classification on August 2, 1966. That request was acknowledged by the Board on August 10, 1966. On August 25, 1966 the Local Board reclassified the registrant into class II-S. Sometime after October 12, 1967 under the delinquency regulations 32 CFR Part 1642 *et seq.* the defendant was reclassified I-A and an order to report for induction was issued on December 11, 1967. Madrid failed to exercise his right to a personal appearance or an appeal upon being reclassified I-A. The Court assumed that the appeal was still pending at the time of this prosecution in 1968. The Court stated:

> Certainly, Section 1625.13[1] of the regulations does not require a registrant to take successive appeals from every

> new classification order entered by the local board while an appeal from an adverse decision on his request for a particular classification is still pending, unless he has in some manner chosen to waive or abandon his appeal. Such is not the case here. On the contrary, defendant has at all pertinent times insisted that he is a conscientious objector entitled to the I-O classification. 314 F. Supp. at 19

That language was adopted by the District Court in granting petitioner's writ. In *Madrid*, as here, there was no appeal still pending. *Madrid's* reclassification into class II-S rendered his appeal board unable to grant him a classification into class I-O because the requested classification was higher than his current classification 32 CFR § 1623.2[13] and § 1626.26.[14] Thus,

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[13] § 1623.2 Consideration of classes.

Every registrant shall be placed on Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class: I-A-O
I-O
I-S
I-Y
II-A
II-C
II-S
I-D
III-A
IV-B
IV-C
IV-D
IV-F
IV-A
V-A
I-W
I-C

[E.O. 10984, 27 F.R. 194, Jan. 9, 1962]

Footnote 14 on following page.

there was no appeal outstanding. That part of the *Madrid* decision relied upon by the District Court implies that local boards lack the authority to reopen classifications once an appeal has been requested. They have that power 32 CFR § 1625.2(b). Such a reopening cures procedural errors with respect to a prior classification *United States v. Hayes*, 493 F.2d 1274 (1st Cir., 1974), *United States v. Hudson*, 469 F.2d 661 (9th Cir., 1972), *United States v. Jack*, 451 F.2d 1272 (9th Cir., 1972), *United States v. Kohls*, 441 F.2d 1076 (9th Cir., 1971) cert. denied 404 U.S. 844 (1971). On a reopening of his Selective Service classification a registrant may exercise his rights of a personal appearance and an appeal based on all prior information submitted to his Local Board *United States v. Bush*, 94 S.C. 441, 38 L.Ed. 2d 331 (1973), see Memorandum of the Solicitor General (App. pp. 104-110) *McKart v. United States*, 395 U.S. 185 (1969) and *McGee v. United States*, 402 U.S. 479 (1970).

Petitioner failed to request a personal appearance or an appeal following two reopenings of his classification and also failed to inform the board of any information concerning his status for classification purposes. He contends he was seeking a student deferment. Each year he was obligated to establish his right to that deferment 32 CFR § 1622.25(1).

In *McKart* the Court posed the question:

> ". . . we must also ask whether allowing all similarly situated registrants to bypass administrative appeal

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[14] § 1626.26 Decision of appeal board.

(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken: *Provided*, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of Part 1625 of this chapter.

[E.O. 9988, 13 F.R. 4874, Aug. 21, 1948, as amended by E.O. 11098, 28 F.R. 2616, Mar. 19, 1963. Redesignated at 14 F.R. 5021, Aug. 31, 1949]

> procedures would seriously impair the Selective Service System's ability to perform its functions." *McKart* at 197.

The Court concluded that since the issue posed was one of statutory construction not calling for any particular expertise on the part of the Selective Service administrative boards judicial review would not be significantly aided by additional administrative decisions and held that *McKart* did not have to exhaust his administrative remedies. In *McGee*, however, the Court reached the opposite conclusion:

> In the present case the same interest is pivotal—but here it is apparent that McGee's failure to exhaust did jeopardize the interest in full administrative fact gathering and utilization of agency expertise, rather than the contrary. Unlike the dispute about statutory interpretation involved in *McKart*, McGee's claims to exempt status—as a ministerial student or a conscientious objector—depended on the application of expertise by administrative bodies in resolving underlying issues of fact. Factfinding for purposes of Selective Service classification is committed primarily to the administrative process, with very limited judicial review to ascertain whether there is a "basis in fact" for the administrative determination. See 50 U.S.C. App. § 460(b)(3) (1964 ed., Supp. V); *Estep* v. *United States*, 327 U.S., at 122-123; cf. *Witmer* v. *United States*, 348 U.S. 375, 380-381 (1955). *McKart* expressly noted that as to classification claims turning on the resolution of particularistic fact questions, "the Selective Service System and the Courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew." *McGee* at 486.

In *United States v. Lyzun*, 444 F.2d 1043 (7th Cir., 1971) cert denied 404 U.S. 968 (1971), decided after *McKart* and *McGee*, the registrant, at a time when he was classified I-A following a personal appearance, requested an appeal so as to offer the Selective Service System proof that he should be classified either as a C.O. (I-O) or as a minister (IV-D). The board

reopened his classification and classified him I-O as requested, but did not forward his file to the Selective Service appeal board. The Court held that the prohibition contained in 32 CFR § 1626.41 against the board's ordering the registrant to report for induction while his appeal was pending expired with the time for appeal from the I-O classification. It specifically rejected *Madrid* and *Olkowski:*

> Literally the regulation [32 CFR § 1626.41] does not apply to the type of order involved in this case. Assuming that it did, we think the time during which it would have prevented an order expired with the time for appeal from the I-O classification.
>
> We also note two decisions holding board orders invalid under somewhat similiar facts.[5] In each case, as in ours, an appeal was filed, but not processed to conclusion, the local board again issued a classification, from which the registrant took no appeal, and the board later issued its order. The Courts in these two instances followed a strict construction and concluded that the registrant's later opportunity to appeal did not cure the failure of the board to process the earlier appeal properly. In this respect we reach a different conclusion. *Lyzun* at 1045.

Petitioner contends that he requested a student deferment. Local Board 88 had information before it which indicated that petitioner was eligible for such a deferment in class I-SC but not class II. That classification could not be granted without the issuance of an order to report for induction. It issued that order then reclassified the petitioner I-SC. That reclassification cancelled the induction order and gave the petitioner the right to a personal appearance and an appeal for a II-S classification 32 CFR § 1625.13. Under the circumstances the board's action was a reasonable exercise of its discretion and should not be used to nullify the remainder of petitioner's Selective Service processing.

In *United States v. Hayes*, 493 F.2d 1279 (1st Cir. 1974) the registrant lost a II-A classification. His employer appealed that decision, however, the registrant did not. Thereafter the registrant was reclassified I-Y, I-A and still later I-O and assigned to civilian work in a Boston hospital. He was prosecuted for leaving that position. After all his reclassifications he never appealed the request for reinstatement of the II-A classification. In answer to his assertion that the board should have classified him in class II-A the Court stated:

> We believe that the board would have been justified in believing that Hayes was no longer interested in the 2-A. Moreover, any claim that the 1-O was invalid should have been presented to the Selective Service System by requesting a personal appearance or an appeal. In fact, no such claim was ever mentioned. This is a case where the by-pass of administrative procedures was prejudicial to the government. McGee v. United States, 402 U.S. 479, 483, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971). *Cf.* McKart v. United States, 395 U.S. 185, 197, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). Had Hayes availed himself of the several opportunities to make clear to the board* his dissatisfaction, if any, with its disinclination to classify him 2-A, the board could have explored the matter in greater depth and either restored the classification or, perhaps more likely, provided the record and reasons now said to be lacking. We think the Selective Service System's ability to function would be seriously impaired, *McKart, supra* at 197, 89 S.Ct. 1657, were afterthoughts of this nature accepted as legally valid excuses. *Hayes* at 1281.

Similarly, Local Board 88 was justified in believing that petitioner no longer desired a II-S classification. He abandoned that request at his personal appearance, failed to submit information relating to his eligibility for that classification and failed to request either a personal appearance or an appeal after two reopenings of his classification even though he was still attending college. His

actions prevented the Selective Service System from utilizing its fact gathering powers and expertise on his claim.

The District Court also relied on *United States v. Olkowski,* 248 F.Supp. 660 (W.D.Wis. 1965) in reaching its decision. *Olkowski* is distinguishable from petitioner's situation. After the registrant's local board failed to forward his file for an appeal, the registrant continued to request reclassification. Each time he requested a reclassification his board declined to reopen his classification so as to afford him an opportunity for further consideration. Thus the registrant was deprived of an opportunity to obtain full administrative review *Mulloy v. United States,* 398 U.S. 410 (1970). Petitioner had that opportunity.

B. The District Court erred in failing to consider the prejudice to the defendant as a result of the Board's failure to forward his file to the Appeal Board after his personal appearance on December 22, 1969.

In *United States* v. *Chaudron,* 425 F. 2d 605 (8th Cir. 1970), cert. denied, 400 U. S. 852 (197), the Court stated:

> A plethora of regulations have been promulgated in the field of Selective Service law, delineating procedures whereby registrants are to be classified, processed, and inducted—or ordered to report for civilian work in lieu of induction. Members of draft boards and their clerks are not experts in Selective Service law. Thus, errors in processing a registrant for induction or alternative civilian work are not infrequent. As the Ninth Circuit observed in Oshatz v. United States, 404 F.2d 9, 12 (9th Cir. 1968): "Even the most casual glance at the case law will reveal a staggering array of deviations from the regulations which have been advanced as defenses to prosecutions for refusal to submit to induction." Consequently, courts have divided the waters of procedural irregularity: Those causing substantial prejudice to flow to the registrant are deemed to mandate sustainment of

> his defense. [Citations Omitted] Those less murky and not rising to the level of substantial prejudice are allowed to trickle off harmlessly [Citations Omitted] It is the accepted view that the registrant asserting prejudice has the burden of proving it. [Citations Omitted] *Chaudron* at 608.

Neither in his petition for a writ of *habeas corpus* nor in his supplementary affidavit did the petitioner assert he was prejudiced by Local Board 88's failure to forward his file for an appeal. See *United States* v. *Velazquez*, 490 F. 2d 29 (2nd Cir. 1973) at 36 and 37. An examination of the facts indicates that petitioner was not prejudiced by the actions of Local Board No. 88.

The Government has conceded that petitioner's letter of November 2, 1970 should have been construed as a notice of appeal (App. p. 30). It is undisputed that petitioner's Selective Service file was never forwarded for an appeal. Thus petitioner lost the right of reconsideration *de novo* by the appeal board for the Western District of New York, 32 CFR § 1626.26 (a).[15] The right to an administrative appeal is an essential procedural right, not only to the registrant but also to the Selective Service System. *Mulloy, supra.* If petitioner was prejudiced, that prejudice occurred from December 22, 1970 until February 2, 1971. Thereafter petitioner suffered no prejudice and the board's subsequent actions eliminated the prejudice from its failure to forward his Selective Service file for an appeal.

On February 2, 1971 petitioner was classified I-SC. Procedurally, he had an opportunity for a personal appearance and an appeal. If he still desired to claim a II-S classification he could have done so. Local Board 88 certainly

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[15] § 1626.26 Decision of appeal board.

(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

could not have been expected to know that he still desired a II-S classification because at his prior personal appearance he requested only a I-Y classification. Substantively, he received a student deferment to the end of his school year, 32 CFR § 1622.15(b). The facts before the board were that he was to receive his degree after five semesters of study instead of four. Thus petitioner did not meet the definition of satisfactorily pursuing a fulltime course of instructions so as to qualify for classification in class II-S under 32 CFR § 1622.25(c).

On June 1, 1971 Local Board 88 reclassified petitioner into Class I-A. Procedurally he again had the right to a personal appearance and an appeal. He again failed to exercise those rights. From June 1, 1971 to October 8, 1971, when Local Board 88 ordered him to report for induction, petitioner failed to provide the Board with any information bearing on his classification at all. If petitioner believed he was entitled to a different classification it was his duty to bring those facts to Local Board 88's attention 32 CFR § 1641.7(a)[16], § 1625.1(b)[17] and § 1622.25(d). In the interim, the Military

[16] § 1641.7 Reporting by registrants of their current status.

(a) It shall be the duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, and of his receipt of any professional degree in a medical, dental, or allied specialist category. Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in such status and in his physical condition and home address and his receipt of any such professional degree.

[17] § 1625.1 Classification not permanent.

(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

Selective Service Act of 1971 was signed into law. Had Local Board 88 reopened his classification he would have been able to present witnesses on his behalf before them, receive a statement of reasons for a denial and appear personally before the Appeal Board 50 U. S. C. App. §471(a).

Even though student deferments were abolished under the new act, P.L. 92-129 § 101 (a), 17(e), 1 1971, U. S. Code Congressional and Administrative News 367, petitioner would have been able to obtain that deferment if he could have qualified for it under the same terms and conditions as he would have been deferred before their abolition P.L. 129 § 100(b), 1 1971 U.S. Code Congressional and Administrative News 371. Here again, petitioner can show no prejudice. Had he been classified II-S that classification would have expired at the end of his academic year and he would have been obligated to establish his continued eligibility for its classification. Petitioner has admitted that he was a full time student at Genesee Community College from the Fall of 1969 until his graduation in June of 1972 (App. pp. 88, 94). He therefore could have submitted information establishing his student status to Local Board 88, however, he failed to do so.

If he had he would still not have been qualified for Class II-S 32 CFR §1622-25(c) *Coleman* v. *Tolson* 435 F.2d 1062 (4th Cir., 1970). In *Coleman* the registrant entered a college program which required him to take a number of courses in his freshman year which prevented completion of the first college year in the usual two semesters. The program itself, however, provided for completion of the normal four year college program in four years by allowing the student to make up the lost credit from his first year during the next three years. The registrant was in the process of making up these credits, and his school had certified that he was expected to graduate after four years, when he was ordered to report for induction. The Court granted his petition:

> There is nothing in the record to suggest that appellant had not performed adequately in the courses he was permitted to take. Since Coleman was prevented from achieving parity through no fault of his own, and was at the time of his reclassification in good standing consistent with the rules of the college, and since it appears probable that he could have made up a seven hour credit deficiency in his final two years, we conclude that was no basis in fact for the removal of Coleman's II-S classification. *Coleman* at 1065.

In petitioner's case, his college certified he would receive his degree in two and one-half years instead of two (App. p. 66) and his affidavits indicated that he actually received that degree in three years instead of two and one half. Thus petitioner was not making up his lost credits, fell further behind in his studies and remained unable to meet the requirement of "satisfactorily pursuing" a full time program of undergraduate instruction.

Petitioner's action is an attempt to evade his obligations under the Military Selective Service Acts of 1969 and 1971. On December 22, 1970 at a personal appearance before Local Board 88 he did not request a student deferment, nevertheless, he obtained one on February 2, 1970. He contends that he obtained this as a result of the intervention of Congressman Henry Smith (App. pp. 7, 8). Neither in his Selective Service file nor in exhibits attached to pleadings or introduced at a hearing is there any record of any inquiries by Congressman Smith on petitioner's behalf. The new notice of classification sent petitioner on February 2, 1971 came from Local Board 88 not from Congressman Smith. Petitioner's failure to press the student deferment after two reopenings of his classification up until the issuance of his induction order on October 8, 1971 indicates that he abandoned his request for a II-S classification and realized he did not qualify for it. His contention that Congressman Smith's office had obtained a deferment or postponement after the mailing of the October

8, 1971 order to report for induction is not true. Not only are his Selective Service records barren of any such congressional inquiry but again neither his petition, supplementary affidavit nor the record of the hearing contain any evidence in support of this assertion. Whereas petitioner received a notice of classification evidencing a deferment after the alleged intervention of Congressman Smith in February, he does not allege receiving such confirmation from his Local Board after the alleged intervention in October. The circumstance should have alerted him that the board had not modified his status. Petitioner should have contacted his Local Board to find out if the promised deferment or postponement had actually been granted. Even after the board rescheduled his induction for October 11, 1972 Petitioner failed to report. Petitioner's indifference prevented the Selective Service System from exercising its administrative discretion and evidenced an intent to circumvent Selective Service laws, *United States v. Sundstrom*, 489 F.2d 859 (2nd Cir., 1973) *McGee, supra.*

III. Conclusion.

For the reasons stated herein the decision of the District Court should be reversed and the District Court should be directed to dismiss the petition and order petitioner to resubmit himself into the custody of the Armed Forces.

Respectfully submitted,

JOHN T. ELFVIN,
United States Attorney,
Attorney for Appellants,
United States Court House,
Buffalo, New York 14202

KENNETH A. COHEN,
Assistant United States Attorney,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

USA ex rel David W. O'Brocta
vs.
Commanding Officer U. S. Armed Forces et al
Docket No. 74-1754

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Roger Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 12th day of August, 19 74 I mailed 2 copies of a printed ~~Bfs. & Appendix~~ in the above case, in a sealed, postpaid wrapper, to:

Joseph D. Bermingham Jr. Esq.
1340 Statler Hilton
Buffalo, N.Y. 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

John T. Elfvin, U. S. Atty,
502 U. S. Courthouse, Buffalo, NY 14202

Roger J. Grazioplene

Sworn to before me this

12th day of August, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19..